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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 868.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,
Appellees.

Appeal from the District Court of the United States for the Southern District of Ohio, Eastern Division.

SEPARATE BRIEF FOR THE APPELLANT, EMPIRE SHEET & TIN PLATE COMPANY.

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INDEX.

	Page
Decision Below. Jurisdiction	1
Statement of the Case	2
Diagram	5
Specification of Errors to Be Urged	6
Argument	7
Summary	7
Point No. 1	
The Public Utilities Commission of Ohio merely adjusted a discrepancy in a rate relationship which was purely intrastate, the general level of which is not disapproved of by the Interstate Commerce Commission; and there was no evidence before the Interstate Commerce Commission to justify it in setting this adjustment aside	7
Point No. 2	
The Interstate Commerce Commission had no power to set aside this single adjustment	8
Conclusion	11

CASES CITED.

American Express Co., et al. v. State of South Dakota, ex rel. Caldwell, as Attorney General of the State of South Dakota, et al., 244 U. S. 617 9

Empire Steel Corporation v. The Baltimore & Ohio Railroad Company, Docket No. 7036 of the Public Utilities Commission of Ohio 2, 3-7

Page

Florida et al. v. United States et al., 282 U. S. 194.... 9

Florida et al. v. United States et al. (decided by this court April 3, 1934, and reported as of date of April 7, 1934, October Term 1933, No. 342) U. S.... 10

Intrastate Rates on Bituminous Coal within the State of Ohio, (Docket No. 25566) 192 I. C. C. 413..... 2

Railroad Commission of Wisconsin, et al. v. Chicago, Burlington & Quincy Railroad Co., 257 U. S. 563 9

United States et al. v. State of Louisiana et al, 290 U. S. 70 10

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DECISION BELOW. JURISDICTION.

Empire Sheet & Tin Plate Company, having been substituted in place of C. H. Henkel, Receiver, Empire Steel Corporation, (R. 465), has joined separately in the appeal in this action from a final decree rendered January 19, 1934, by a three-judge Federal Statutory Court for the Southern District of Ohio, Eastern Division. The opinion is not officially reported. The sole purpose of a separate brief is to call to the attention of the Court certain facts and points of law which, as to this appellant, are different and distinct from the other questions under consideration in this appeal. Appellant has joined in a statement as to jurisdiction, pursuant to the rules of this Court.

STATEMENT OF THE CASE.

The order, approved by said Federal Statutory Court, of the Interstate Commerce Commission here complained of, *Intrastate Rates on Bituminous Coal Within the State of Ohio* (Docket No. 25566, decided May 2, 1933), 192 I. C. C. 413, involved several orders made by the Public Utilities Commission of Ohio in proceedings pending before it entitled:

Docket No. 7252—*Republic Steel Corp. v. The Baltimore & Ohio Railroad Company et al.*, dated June 30, 1932 (R. 119);

Docket No. 7036—*Empire Steel Corp. v. The Baltimore & Ohio Railroad Company*, dated July 25, 1932 (R. 122, Vol. I, Exhibits before I. C. C. page 60);

Special Permission
Docket No. 6492—*Application of The Wheeling & Lake Erie Railway Company, et al., for Permission to Publish Rates on Bituminous Coal*, dated July 21, 1932 (R. 145);

Docket No. 8072—*Investigation of Rates on Bituminous Coal from Cambridge, Crooksville & Hocking Districts*, dated September 15, 1932 (R. 148);

Docket No. 8097—*Investigation of Rates on Bituminous Coal from the Pomeroy District*, dated October 18, 1932 (R. 151).

All of these orders affected the *general level* of certain intrastate rate relationships so far as the movement of bituminous coal in carload lots in Ohio was concerned, except the order made in *Empire Steel Corporation v. The Baltimore and Ohio Railroad Co., supra*, P. U. C. of Ohio, Docket No. 7036 (referred to in these proceedings as the *Empire* case), in which *only one rate*—that from the Cambridge district in Ohio to Mansfield, Ohio—was concerned.

At the time the complaint was filed by Empire Steel Corporation with the Public Utilities Commission of Ohio, the

intrastate freight rates on bituminous coal to Mansfield, Ohio, from certain bituminous coal producing districts in Ohio were as follows:

a. From the Crooksville, the Shawnee and the Upper Hocking coal districts	151 cents
b. From the Cambridge coal district	176 cents

As a result of the findings of the Public Utilities Commission of Ohio in the *Empire* case, the freight rate from the Cambridge, Ohio, coal district to Mansfield, Ohio, was reduced to 151 cents (R. 122, 144, Vol. I, Exhibits before I. C. C. page 60). The Interstate Commerce Commission by its order (R. 17, 76-77) restored this particular freight rate to 176 cents. The Statutory District Court refused to enjoin the Interstate Commerce Commission from carrying its order into effect.

Empire Sheet & Tin Plate Company has been substituted for the original complainant, Empire Steel Corporation, and is the successor to the rights and interests of Empire Steel Corporation by purchase. Engaged in the manufacture of bars, sheets and other steel products at Mansfield, Ohio, appellant and its predecessor, Empire Steel Corporation, have been and appellant now is consuming large quantities of coal from various coal producing districts in Ohio and elsewhere. The City of Mansfield lies to the north of the cities of Newark and Mount Vernon and to the south of Shelby, in the State of Ohio. The rates on bituminous coal from the Cambridge, Crooksville, Shawnee and Upper Hocking coal producing districts in Ohio to Newark, Mount Vernon and Shelby have always been equalized from all of said coal districts. The rate from the Crooksville, Shawnee and Upper Hocking districts to Mansfield was and has been 151 cents. (R., Table 125) The rate from the Cambridge districts to Mansfield was, prior to August 20, 1932, and since January 19, 1934, has been, 176 cents. (R. 125, Appendix D, 76-77)

The Public Utilities Commission of Ohio found (R. 124, 125):

"* * * It is to be particularly noted that from the Cambridge, Crooksville, Shawnee and Northern Hocking districts, when routed over the line of the defendant, the rates are all equalized at Newark, Ohio, all rates to that point being 113 cents; to Mt. Vernon, the rates are again equalized from said districts, all rates being 139 cents; to Mansfield, the rate from the Crooksville, Shawnee and Northern Hocking districts is 151 cents while the rate from the Cambridge District is 176 cents; to Shelby, Ohio, directly North of Mansfield, the rates from all 4 districts are again equalized, all rates being 176 cents. The record shows that the coal from the Cambridge, Crooksville and Northern Hocking districts is classified at Newark and the movement beyond Newark is the same regardless of point of origin.

"The rates are equalized at points both North and South of Mansfield, while a difference of 25 cents exists at Mansfield from the Cambridge district compared with the Shawnee, Crooksville and Northern Hocking districts. The table below shows the rates and average mileage from these various districts to the 4 points heretofore mentioned, compiled from complainant's Exhibits Nos. 11 and 12.

From District	Origin Carrier	Rates				Average Mileage			
		Newark	Mt. Vernon	Mansfield	Shelby	Newark	Mt. Vernon	Mansfield	Shelby
Cambridge	B&O	113	139	176	176	62	86	(2)126.1	135
"	PRR	113	139	176	176	92	(1)100.7	(3)115.8	134
Shawnee	B&O	113	139	151	176	45	69	105.3	117
Northern Hocking	NYC	113	139	151	176	66	96	119.2	131
Crooksville	B&O								
	NYC								
	PRR								
	W&LE	113	139	151	176	42	70	(4)112.0	121

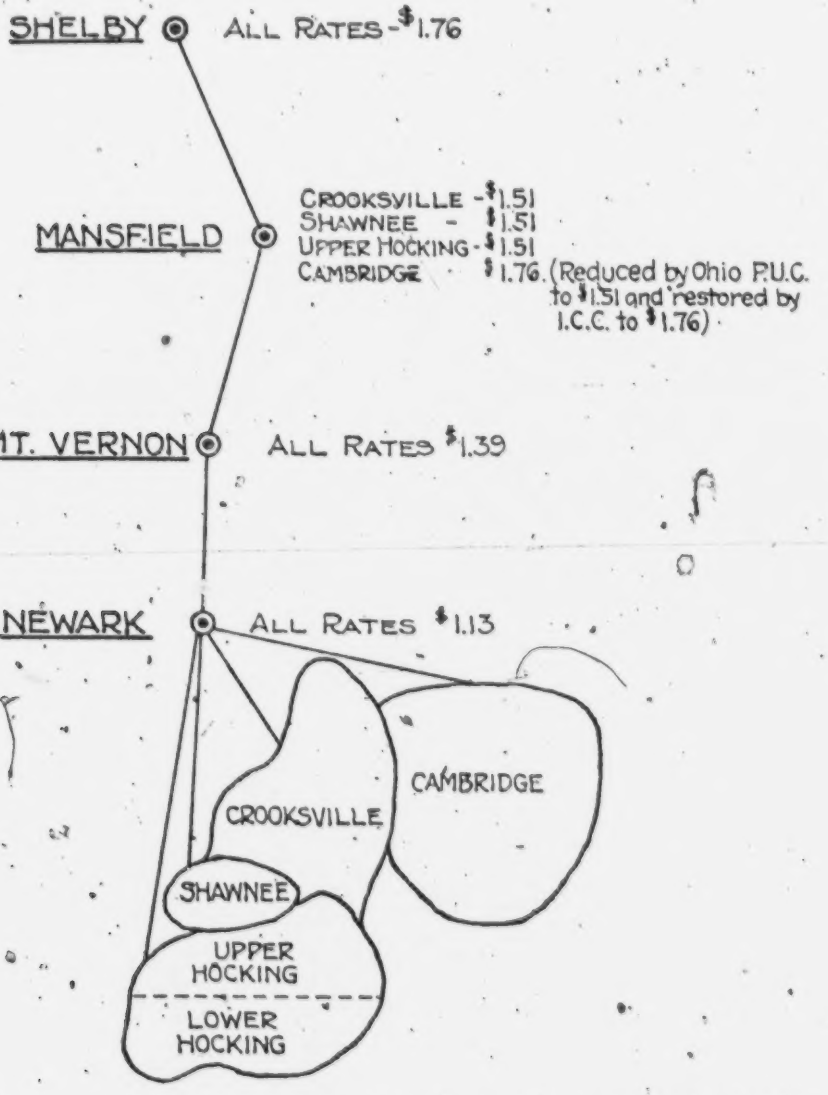
(1) Revised by Commission: Complainant shows an average of 169 miles, figured via Newcomerstown, Trinway and Columbus. Our mileage figured via Newcomerstown, Coshocton and Brinkhaven.

(2) Defendant's mileage: Complainant shows an average of 124 miles.

(3) Defendant's mileage: Complainant shows an average of 119 miles.

(4) Based on complainant's Exhibit 12. Defendant's Exhibit 20 shows 112.4 miles. Based on complainant's Exhibits 6 to 10, inclusive, the average appears to be 107.9 miles from 86 mines."

The situation as found by the Public Utilities Commission of Ohio may be graphically illustrated by the diagram below which is more convincing than a prolonged statement of facts. It clearly shows the logic of the report and order of the Public Utilities Commission of Ohio in the *Empire* case.



The report of the Public Utilities Commission of Ohio shows that the defendant there, The Baltimore & Ohio

Railroad Company, admitted that the rate from the Cambridge district to Mansfield should be changed but opposed its reduction to the extent sought and secured by this appellant. (R. 125)

The Public Utilities Commission of Ohio also found that the rate from the Cambridge district to Mansfield when reduced from 176 cents to 151 cents was justified when compared to the rates from a great many other important coal districts to the destination points at which appellant's principal competitors were located. (R. 135 and table there compiled.)

It should be noted that, except for the Cambridge-Mansfield rate, the rates from the Cambridge, the Shawnee, the Upper Hocking and the Crooksville districts, to Newark, Mount Vernon, Mansfield and Shelby *were not changed*, except for the emergency rates or charges authorized by the Interstate Commerce Commission. They are still at the old figures. Their traditional relationship and level, except for the Cambridge-Mansfield rate, were left undisturbed by the Public Utilities Commission of Ohio and were not affected by any of the orders of the Interstate Commerce Commission complained of. (R. Appendix D, 76, 77)

SPECIFICATION OF ERRORS TO BE URGED.

Appellant, Empire Sheet & Tin Plate Company, maintains that the Federal Statutory District Court committed reversible error. (R. 490 at 495)

> "(XVI) In failing to find that the order of May 2, 1933, in Docket No. 25566 can not be upheld as an exercise of the power to remove undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate on the one hand and interstate commerce on the other hand;
>
> "(XVII) In failing to hold that the finding of the Commission that the rate prescribed by the Ohio Commission by its order of July 25, 1932, in

its Docket No. 7036, *Empire Steel Corporation v. The Baltimore & Ohio Railroad Company*, from mines in the Cambridge district to Mansfield, Ohio, caused undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand, or undue, unreasonable or unjust discrimination against interstate commerce, was not supported by evidence and was contrary to the law and the evidence."

ARGUMENT.

Summary.

Involving only one question of fact, to wit, the propriety of the single rate from the Cambridge district to Mansfield, Ohio, appellant maintains that the action of the Public Utilities Commission of Ohio merely corrected *a single maladjustment* in an intrastate rate relationship, and, as the general level of this adjustment has not been found by the Interstate Commerce Commission to be discriminatory, but on the contrary has been adopted by it (R. Appendix D, 76-77), that body had no power to adjust that particular rate.

Point No. 1.

The Public Utilities Commission of Ohio Merely Adjusted a Discrepancy in a Rate Relationship Which Was Purely Intrastate, the General Level of Which is Not Disapproved of by the Interstate Commerce Commission; and There Was No Evidence Before the Interstate Commerce Commission to Justify It in Setting This Adjustment Aside.

The order of the Public Utilities Commission of Ohio cured the evident defect in the then existing internal relationship in Ohio intrastate rates, which the defendant, The Baltimore & Ohio Railroad Company, in the proceedings before the Ohio Commission, indicated might be discrim-

inatory and preferential. While it did not agree that the rate should be reduced to 151 cents so far as the Cambridge rate to Mansfield was concerned, it maintained that it should be lowered to a less extent, to-wit, 164 cents. (R. 125) The Public Utilities Commission of Ohio did not accept this suggestion. Had this been ordered, it would have meant a readjustment of the entire intrastate rate structure from all of the coal producing districts here under consideration. The conclusion of the Public Utilities Commission of Ohio is fully substantiated by the evidence that this one rate from the Cambridge district to Mansfield was unduly prejudicial and discriminatory to the City of Mansfield and Empire Steel Corporation, and was out of line with the adjustment then existing. Furthermore, all of the evidence before the Interstate Commerce Commission had to do with the general intrastate rate structure in Ohio as affected by the orders of the Public Utilities Commission of Ohio other than that rendered in the *Empire* case; and as far as the order in the *Empire* case goes, there was no evidence whatsoever which could justify its being set aside.

The error in the order of the Interstate Commerce Commission in so far as it restores this old rate becomes apparent when one considers the fact that it annuls the order of the Public Utilities Commission of Ohio bringing the rate from the Cambridge district to Mansfield, Ohio, into line with the general level in force prior to August 1, 1932 (R. Appendix A, 70, Appendix D, 76-77) which level the Interstate Commerce Commission at the same time established as its criterion.

Point No. 2.

The Interstate Commerce Commission Had No Power to Set Aside this Single Adjustment.

The finding of the Interstate Commerce Commission is that the lowering of the rates after August 1, 1932, by the Public Utilities Commission of Ohio, not only in the *Empire* case but in the other cases involved in this appeal, was

unduly prejudicial to persons and localities in interstate commerce and placed an undue burden thereon. It is elementary that there should be evidence to support an order directed to the removal of such discrimination. *Florida et al. v. United States et al.*, 282 U. S. 194

It is maintained that the Interstate Commerce Commission has no power over intrastate rates as between themselves when the general level is not discriminatory against interstate commerce. *Railroad Commission of Wisconsin, et al. v. Chicago, Burlington & Quincy Railroad Co.*, 257 U. S. 563. The Court there, in the course of its opinion, at pages 590-591, says:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. *Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (Italics ours.)

The lowering of the Cambridge-Mansfield rate in the instant case very clearly was an adjustment of intrastate rates as between themselves only, to the general level found to be fair by the Interstate Commerce Commission within the meaning of the *Railroad Commission of Wisconsin* case, *supra*, (257 U. S. 563) and the Interstate Commerce Commission had no jurisdiction to set it aside. Its power is dominant only as to discrimination against interstate commerce, and the justification for its interference with intrastate rates must clearly appear. *American Express Co. et al. v. State of South Dakota, ex rel. Caldwell, as Attorney General of the State of South Dakota et al.*, 244 U. S. 617.

It is true, as is said in *United States et al. v. Louisiana et al.*, 290 U. S. 70, at pages 76-77, that the Interstate Commerce Act "does not, in terms, command the Commission to find that each rate prescribed * * * is just and reasonable, as a prerequisite to a general increase in rates," and "* * * the ultimate finding that the rates as generally applied are reasonable, supported by evidence and accompanied by suitable reservation of the rights of all interested parties to secure modification of any particular rate which, when challenged, is found to be unjust or unreasonable, complies with the statute." But the present case, so far as this appellant is concerned, is not one where a suitable reservation of rights is enough. Appellant has already challenged and secured a modification of the particular rate, pursuant to a full hearing on the merits before the Public Utilities Commission of Ohio. The matter was squarely before the Interstate Commerce Commission when the latter set aside the order of the State Commission. The situation referred to in the *Louisiana* case, *supra*, (290 U. S. 70) is where there has never been any investigation into the reasonableness of the particular rate claimed to constitute an exception to the propriety of a general increase; and the same is true in the case of *Florida et al. v. United States et al.*, (decided by this court April 3, 1934, and reported as of date of April 7, 1934, October term 1933, No. 342) — U. S. — where this Court approved an order of the Interstate Commerce Commission making a general increase of certain intrastate rates with a suitable reservation of rights. In this particular instance there has been an investigation. Furthermore, the order of the Interstate Commerce Commission was not a general increase, but was a restoration of the *status quo* existing prior to August 1, 1932, and was directed merely at reductions by the Public Utilities Commission of Ohio which were inconsistent with that status. The Mansfield reduction was consistent with it and had been deliberately required for that purpose.

It being clear that the state authorities alone have the right and power to adjust intrastate rates as between

themselves, the general level thereof not having been found unfair by the Interstate Commerce Commission, the Interstate Commerce Commission therefore was without authority or jurisdiction to annul this particular order of the Public Utilities Commission of Ohio in fixing the rate from the Cambridge coal producing district to Mansfield, Ohio, at 151 cents.

The only grounds upon which the Interstate Commerce Commission could so proceed were either—

(1) By finding that the level of the whole relationship of which the Cambridge-Mansfield rate comprised a part was too low, and by then raising the whole level, along with the rate in question; or,

(2) By finding that the Cambridge-Mansfield rate did not belong in the relationship of which it had always been a part.

The Interstate Commerce Commission did not make either of these findings. The rate relationship to Newark, Mt. Vernon and Shelby, Ohio, was never disturbed, even by the Public Utilities Commission of Ohio; and the evidence clearly shows that the Cambridge-Mansfield rate, when reduced to 151 cents, is an integral and harmonious part of that relationship. (R., Appendix D, 76-77)

In the confusion of a great many other issues, unrelated to the one here in question, the Interstate Commerce Commission and the Court below completely overlooked the importance of recognizing the sovereign right of a State to regulate intrastate commerce in so far as adjustments are made in freight rates to meet a general rate level which is not discriminatory against interstate commerce.

CONCLUSION.

We submit therefore that the Court below should have found that the Interstate Commerce Commission was without power to require an increase of the *single* rate, fixed by the Public Utilities Commission of Ohio, from the Cam-

bridge District to Mansfield and that regardless of the conclusions which this Court may reach so far as the other issues in this appeal are concerned, this Court should find that said Cambridge-Mansfield rate should have been restored to a parity with the rates from the Crooksville, the Shawnee and the Upper Hocking Districts, in Ohio, to Mansfield and the orders of the Court below and the Interstate Commerce Commission should be so modified.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof addressed to each party.

H. Austin Hauxhurst.

April 16, 1934.
Washington, D. C.